



supplements while he was housed at Crossroads Correctional Center. He further claims that defendant Almanza denied his prescribed food supplements and disregarded his medical needs after receiving notice of those needs while he was at Crossroads Correctional Center.

Plaintiff does not dispute the records submitted by defendants which show plaintiff was last housed at Crossroads Correctional Center on July 14, 1998, when he was transferred to Missouri State Penitentiary. Plaintiff does not allege that defendants Matthews and Almanza treated him at any institution other than Crossroads. Thus, defendants Matthews and Almanza last treated plaintiff in July 1998.

In his complaint, at paragraph 19, plaintiff states that "Dr. E. Conley, whom was plaintiff's chronic care physician from 1994-1998, deliberately refused plaintiff blood thinner prescribed medication." Thus, the face of the complaint indicates that the actions about which plaintiff complains occurred in or prior to 1998. Plaintiff filed this lawsuit on September 14, 2004.

In Wilson v. Garcia, 471 U.S. 261, 275 (1985), the Court specifically held that "the statute is fairly construed as a directive to select, in each State, the one most appropriate statute of limitations for all § 1983 claims." Accordingly, the Missouri five-year personal injury statute of limitations applies to section 1983 claims. Chandler v. Presiding Judge, Callaway County, 838 F.2d 977 (8th Cir. 1988).

Plaintiff appears to acknowledge that the events occurred more than five years prior to his filing this lawsuit, but argues that the statute should be tolled during the time it took to exhaust his administrative remedies. In support, he submits a copy of an order in Smith v. Unknown Corrections Officer, MSP, No. 04cv1605 (E.D. Mo. 2005), which permitted a case to proceed at the initial screening stage because there was a possibility that tolling might be applicable. The case did not decide the issue or hold that tolling applied to prisoner civil rights claims while administrative remedies were being exhausted, but noted that the Eighth Circuit Court of Appeals had not decided the issue and plaintiff had an arguable claim.

This case is not at the initial screening phase, however. Defendants' motion specifically seeks dismissal based on the statute of limitations. Thus, plaintiff has an

obligation to come forward with some proof that tolling should apply and that, with tolling, his claims would not be barred.

Plaintiff has not done so. He did not submit any records or show any dates suggesting how long it took to exhaust his administrative remedies. The five-year statute of limitations would bar claims for events which occurred prior to September 14, 1999. The claims against defendants Matthews and Almanza were for events which occurred prior to July 14, 1998, which is 14 months prior to the September 14, 1999, cutoff date. The claims against defendant Conley were for events which occurred between 1994 and 1998, which is at a minimum of 9 months prior to the September 14, 1999, cutoff date. Unless plaintiff has proof that he timely sought administrative remedies and they were not exhausted within the appropriate time frames, his tolling argument fails even if tolling is applicable.<sup>1</sup>

In the absence of such evidence, plaintiff has not met his burden and the motion to dismiss should be granted.

Named as provisional defendants in this case are Dr. Armstrong, Dr. Sutherland and Dr. Richard Smith. Plaintiff complied with the order to supply the court with addresses for service of process, but service at those addresses were returned, unexecuted. Fed. R. Civ. P. 4(m) provides as follows:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Here, it has been more than 120 days since plaintiff's original complaint was filed. Service has been attempted upon defendants Armstrong, Sutherland and Smith and were returned unexecuted. Plaintiff has not provided additional addresses.

THEREFORE, IT IS ORDERED that within twenty days, plaintiff show cause why his claims against defendants Armstrong, Sutherland and Smith should not be dismissed, pursuant to Fed. R. Civ. P. 4(m). It is further

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<sup>1</sup>At this stage, the court does not find it necessary to address whether or to what extent tolling should apply while a prisoner pursues available administrative remedies.

ORDERED that within twenty days, plaintiff show cause why defendant Neal's motion of February 18, 2005, to dismiss should not be granted. It is further

RECOMMENDED that the December 16, 2004, motion to dismiss filed by defendants Conley, Matthews and Almanza be granted and the claims against them be dismissed because barred by the statute of limitations [14].

Under 28 U.S.C. § 636(b)(1), the parties may make specific written exceptions to this recommendation within twenty days. If additional time is needed, a motion for an extension of time must be filed within twenty days. The motion should state the reasons for the request. *See Nash v. Black*, 781 F.2d 665, 667 (8th Cir. 1986) (citing *Thomas v. Arn*, 474 U.S. 140 (1985)); *Messimer v. Lockhart*, 702 F.2d 729 (8th Cir. 1983). Failure to make specific written exceptions to this report and recommendation may result in a waiver of the right to appeal.

Dated this 17<sup>th</sup> day of March, 2005, at Jefferson City, Missouri.

/s/ \_\_\_\_\_

WILLIAM A. KNOX  
United States Magistrate Judge